IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 745 of 1997

with

CRIMINAL APPEAL No 1137 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE M.H.KADRI
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

BABUBHAI LAXMANBHAI

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 745 of 1997

MRS BHARTI D BHATT for Appellant.
MR PM VYAS for Appellant.
MS REKHA H KAPADIA for Appellant.
MR HIREN P VYAS for Appellant.
MS MONA B RAVAL for Appellant.
MS BR GAJJAR APP for Respondent.

2. Criminal Appeal No. 1137 of 1997

MS BR GAJJAR APP for Appellant.
MR DR BHATT for Respondent.

CORAM : MR.JUSTICE M.H.KADRI
and
MR.JUSTICE H.H.MEHTA

Date of decision: __/10/2002

CAV JUDGEMENT

(Per : MR.JUSTICE H.H.MEHTA)

#. As these two appeals are arising from one judgment Ex.60 dated 19/6//1997 rendered by the learned Additional Sessions Judge, Valsad at Navsari (who will hereinafter be referred to as the "learned Judge of the trial Court") in Sessions Case No. 136 of 1995 whereby the appellant of Criminal Appeal No. 745 of 1997 is convicted and sentenced and respondents of Criminal Appeal No. 1137 of 1997 are acquitted of the offences for which the charge was framed against them, at the request of the learned Advocates for the parties of these two appeals, these two appeals are heard, decided and disposed of by this common judgment.

#. The appellant of Criminal Appeal No. 745 of 1997, who was the accused No.1 in aforesaid Sessions Case No. 136 of 1995, has, by filing Criminal Appeal No. 745 of 1997 under Sec.374(2) of the Criminal Procedure Code, 1973 (for short "Cr.P.C."), challenged the correctness and legality of aforesaid judgment Ex.60 dated 19/6/1997 rendered in Sessions Case No. 136 of 1995 by the learned Additional Sessions Judge, Valsad at Navsari, whereby he has been convicted under Sec. 235(2), Cr.P.C. for offences punishable under Secs. 302,307, and 436 of the Indian Penal Code and is sentenced for the offence punishable under Sec.302, I.P.C. to undergo life imprisonment and to pay a fine of Rs.7,000/- and in default to pay a fine, to undergo further Rigorous Imprisonment for one year, for offence punishable under Sec.307, I.P.C. he is sentenced to undergo Rigorous Imprisonment for 10 years and to pay a fine of Rs.5,000/and in default to pay a fine, to undergo further Simple Imprisonment for six months and for offence punishable under Sec. 436, I.P.C. he is sentenced to undergo Rigorous Imprisonment for five years and to pay a fine of Rs.5,000/- and in default to pay a fine, to undergo further Simple Imprisonment for six months. The learned Judge of the trial Court directed that the accused No.1 shall undergo all the sentences concurrently. It was further ordered that if the accused No.1 pays a fine as per aforesaid order, an amount of Rs.15,000/-, out of total amount of fine be paid to victim Urmilaben Govindbhai whose husband Govindbhai died

in the incident.

#. The State Government has, by filing Criminal Appeal No. 1137 of 1997 under Sec.378(1), Cr.P.C. challenged the aforesaid judgment Ex.60 dated 19/6/1997 rendered in Sessions Case No. 136 of 1995 by which the original accused Nos. 2,3 and 4 were acquitted under Sec. 235(1) of Cr.P.C. of offences punishable under Sec. 302 read with Sec. 114 of I.P.Code, under Sec. 307 read with Sec.114 of I.P.Code and under Sec. 436 read with Sec. 114 of I.P.Code.

#. The facts leading to these two appeals in a nut shell are as follows:

4.1 Deceased Govindbhai Laxmanbhai Champaneria was residing with his wife Urmilaben (P.W.2) in house situated opposite to Gram Panchayat Office in village Saribujrang (Tal. Gandevi, Dist. Valsad). Said Govindbhai had only one daughter named Nayana who is married and is staying with her husband, abroad in Africa. Govindbhai is doing business of preparing one Part (Patti) which is used in Textile Industry at Udhna and his wife Urmilaben was doing manual household labour work at Surat. Both husband and wife were commuting by train in between Amalsad and Surat.

4.2 Accused No.1 Babubhai Laxmanbhai is elder brother of Govindbhai Laxmanbhai, whereas accused No.3 Bhanuben is the wife of accused No.1. Accused No. 2 -Aswinbhai and accused No.4 -Anitaben are the son and daughter-in-law of accused Nos. 1 and 3 respectively. For the sake of convenience, accused will be referred to hereinafter as A-1, A-2, A-3 and A-4.

4.3 Deceased Govindbhai and Urmilaben were staying in one house which was running in the name of father of the deceased and A-1 in Government Records. From record, it appears that the Kachha house in which the deceased and his wife Urmilaben were residing, was consisting of two rooms. Room towards west was divided into two parts by making partition with the help of Galvanized Iron-Sheets in such a way that each part has its own opening towards the west. The portion towards north was in use of the deceased and Urmilaben and portion towards south was being used by all the accused. Each portion has its own loft and one can see as to what is happening in the loft of southern portion, from northern portion. The second room of that house was towards east and it was being used by all the accused. It is also the case of the prosecution that one Pacca built house of A-1 is situated

adjacent to aforesaid house towards north and it was being exclusively used by A-1 and A-3.

4.4 Incident took place at about 2-00 a.m. in the mid-night on 10/2/1995. As stated by the deceased Govindbhai in his complaint Ex.47, in the morning at about 6-30 hrs. of 9/2/1995, he and his wife had left their village for Surat by Valsad Local Railway Train. Both husband and wife returned to their house in the evening at about 7-30 p.m. It is the case of the prosecution that when they opened the gate and entered into their house, they found that smell of Kerosene was emitting from the house. They were under impression that Kerosene might have been spilt over, from the container and therefore, they did not bother much for that smell. Urmilaben prepared meals for their dinner and after taking their dinner, they went to their beds to have their sleep at about 9-00 p.m.

4.5 At about 2-00 a.m. in the midnight, deceased Govindbhai awoke because of some sound from loft being heard by him and saw with the help of light of torch in the loft. He saw that his elder brother Babubhai Laxmanbhai Champaneria (A-1), his wife Bhanuben Babubhai Champaneria (A-3), his son Aswin Babubhai (A-2) and Anita Aswin (A-4) were there in the loft and they poured petrol from carboy on Govindbhai as well as his wife Urmila (P.W.2). All the accused were uttering "today we will kill you". Thereafter, accused ignited something and threw that article on deceased and Urmilaben as a result of which suddenly there was a fire following blaze. Deceased and Urmilaben sustained serious burn injuries due to the fire. Both of them raised shrieks for help. When they were trying to open the doors of their house, they found that the doors were shut from outside. It is the case of the prosecution that as the deceased and Urmilaben raised shrieks, all the accused ran away from the loft.

4.6 Coincidently, at that time two police persons i.e. P.W.3 Valliuddin Usnuddin, Police Constable and P.W.4 Ashokbhai Rajaram were on night petrolling duty by moving in Jeep and when they were passing on the road abutting to Saribujrang Gram Panchayat Office. They saw that one house had caught fire. P.W. 3 Valliuddin got their vehicle halted then and there and both police persons went running towards that house. Constable Ashokbhai was trying to open the doors of that house. Valli Uddin and driver of that jeep tried to call the persons residing nearby. The driver of that jeep informed the Police Station by giving wireless message.

Meanwhile, one Firebrigade Van came there. Police Constable Ashokbhai broke opened that doors of the house. That police persons saw that on doors being broken, one lady first came out from that house and following her, one male person was coming out of the house. Both were burning by fire. As per the case of the prosecution, that lady who first came with burn injuries, was P.W.2 Urmilaben wife of the deceased Govindbhai, whereas the male person who followed her was the deceased Govindbhai. They had sustained severe burn injuries.

#. It appears from the record that as a result of information given by the Jeep driver on wireless message, Head Constable Gamanbhai Gulabbhai of Amalsad Out Post sent a Yadi ex.20 to P.S.I. Gandevi. On receipt of that Yadi, Entry No.2/95 in Police Station Diary was made in Gandevi Police Station at about 4-00 a.m. on 10/2/1995. As per the evidence of P.W. 3 Valliuddin, he immediately took Govindbhai and Urmilaben, by taking them in Jeep, to Primary Health Center, Amalsad. They reached Primary Health Center, Amalsad at 3-00 a.m. As per the case unfolded by the prosecution, P.W.7 Dr. Dipakkumar Mohanlal Patel was on duty as Medical Officer of Primary Health Center at Amalsad. As per his evidence, at about 3-00 a.m. one police person had brought one lady and one male person to him and both had sustained burn injuries. As P.W.7 Dr. Dipakkumar found that both had sustained severe burn injuries, he immediately referred that two persons to Mengusi General Hospital at Bilimora. Thereupon, P.W.3 Valliuddin immediately shifted Govindbhai and Urmilaben to Mengusi General Hospital at Bilimora. At Mengusi General Hospital at Bilimora, it was told that these two persons had sustained severe burn injuries, and therefore, they should be taken to Navsari Civil Hospital. From record, it appears that a 'refer note' Ex.42 prepared by Medical Officer of Mengusi General Hospital, Bilimora and addressed to Chief Medical Officer, Navsari Civil Hospital, Navsari was given to P.W. 3 Valliuddin. Immediately thereafter, two injured persons were shifted to the Civil Hospital at Navsari. As per record, they reached civil Hospital at Navsari at about 5-00 a.m. At that time, P.W.8 Dr. Ajaykumar Jankiprasad Sharma who was a Medical Officer was present on duty in the Civil Hospital at Navsari. As per evidence of Dr. Sharma, at 5-00 a.m. on 10/2/1995, Urmilaben and Govindbhai who had sustained burn injuries were brought by police to him along with a reference note of Medical Officer of Mengusi General Hospital, Bilimora. Dr. Sharma examined both the persons one by one. As per deposition of Dr. Sharma, Govindbhai told Dr. Sharma that he was burnt by his elder brother, while Urmilaben

informed him that the elder brother of her husband had burnt her. They both also informed him that their hut was set on fire. As per evidence of Dr. Sharma, he immediately prepared the medical case papers wherein he noted down history given by deceased Govindbhai and Urmilaben. Dr. Sharma immediately started to give medical treatment to both the injured persons. Meanwhile, Dr. Sharma informed P.S.O. of Navsari Town Police Station by telephonic message at about 7-25 hrs. Thereupon, P.S.O. of Navsari Town Police Station made entry No.5/95 in the Station Diary at 7-25 a.m. on 10/2/1995. Immediately, thereafter P.S.O. of Navsari Town Police Station wrote a Yadi Ex.50 to the Executive Magistrate of Navsari. Simultaneously, P.S.O. of Navsari Town Police Station informed P.W.9 P.S.I. Henri Jullius Kin by giving him a Vardhi, as a result of which, P.W. 9 Henri immediately rushed to the Civil Hospital, Navsari and he recorded a complaint Ex.47 of injured Govindbhai Laxmanbhai in the Hospital at about 8-15 a.m. That complaint was sent to P.S.O. of Navsari Police Station for its registration. That complaint came to be registered for offences punishable under Secs. 307-114 of I.P.Code. As the offences took place within the jurisdiction of Gandevi Police Station, that complaint was sent to Gandevi Police Station where it was registered as CR.No. I 11/95 at 14-20 hrs. From record it appears that the Yadi Ex.50 was first taken to Dr. Sharma. Dr.Sharma put an endorsement in margin of the Yadi Ex.50 to the effect that the patient was conscious and could speak. That Yadi was received by P.W.9 Mohanbhai Kikabhai Mistry, Deputy Mamlatdar-cum-Executive Magistrate of Navsari at about 9-15 a.m. on 10/2/1995. He, by taking him with said Yadi Ex.50, rushed to the Civil Hospital, Navsari. He contacted the Doctor in the Hospital and collected information as to whether Urmilaben and Govindbhai were conscious or not. Doctor informed him that both the patients were conscious and their dying declarations could be recorded. Hence P.W.9 Mohanbhai who was the Executive Magistrate, first recorded dying declaration of Urmilaben Exh.51 during the period from 9-20 a.m.to 9-35 a.m. Thereafter, he recorded dying declaration of deceased Govindbhai Ex.52 during the period between 9-40 a.m. and 10-10 a.m.

#. P.S.O. of Gandevi Police Station entrusted the investigation to P.W.10 P.S.I. Navinchandra Vitthalbhai Desai. He first went to the Civil Hospital, Navsari and recorded further statements of the complainant, Urmilaben and other witnesses. He thereafter went to village Sari Bujrang and drew a panchnama of scene of offence. He also drew a panchnama of damage caused to the property.

During the treatment, complainant Govindbhai Laxmanbhai died at 4-10 a.m. on 12/2/1995. Therefore, the Investigating Officer drew an Inquest Panchnama Ex.17 during the period from 9-45 a.m. to 10-15 a.m. Thereafter, the Investigating Officer wrote a yadi to the learned J.M.F.C. Gandevi requesting him to add an offence punishable under Sec.302, I.P.Code in the FIR registered at CR.No.I 11/95. He further conducted investigation of the case and ultimately he arrested all the accused on 13/2/1995. He sent muddamal articles seized from the scene of offence along with forwarding letter Ex.55 to the Forensic Science Laboratory for analysis. On receipt of the report Ex.56 of Forensic Science Laboratory, he filed the chargesheet in the Court of the learned J.M.F.C., Gandevi on 3/5/1995. That chargesheet came to be registered as Criminal CaseNo.694 of 1995. Thereafter, on 3/11/1995, the learned J.M.F.C. Gandevi passed committal order under Sec.209, Cr.P.C. and committed the case to the Court of Sessions, Valsad at Navsari. On receipt of the papers along with muddamal articles, the learned Sessions Judge, Valsad at Navsari registered the case as Sessions Case No. 136 of 1995.

#. The learned Judge of the trial Court framed charge Ex.9 on 18/12/1996. On recording plea of the accused, they have not pleaded guilty to the charge and claimed to be tried. Hence, the prosecution has examined following 11 witnesses to prove the guilt of the accused:

(1) P.W. 1 Arvindbhai Jinabhai Patel (Panch Witness) at Ex.27.

(2) P.W.2 Urmilaben Govindbhai Champaneria at ex.30 (victim and injured person).

(3) P.W.3 Head Constable Valliuddin Usnuddin at Ex.33
(4) P.W. 4 Police Constable Ashok Rajaram at Ex34.
(5) P.W.5 Dhansukhbhai Maganbhai (Panch Witness) at Ex.35.

(6) P.W.6 Dr.Jagdishprasad Ramsing Gupta at Ex.37.
(7) P.W.7 Dr. Dipakkumar Mohanlal Patel at Ex.39.
(8) P.W.8 Dr.Ajaykumar Jankiprasad Sharma at Ex.40.
(9) P.W.9 Henari Jullius Kin (P.S.I. of Navsari Police Station) at Ex.46.

(10) P.W.9 (P.W.10) Mohanbhai Kikabhai Mistry (Executive Magistrate) Ex.49.

(11) P.W.10 (P.W.11) Navinchandra Vitthalbhai Desai (P.S.I. Gandevi Police Station) at Ex.54.

#. The prosecution has also produced following important documentary evidence along with other documents in support of its case:

(1) Panchnama of scene of offence Ex.28.
(2) Panchnama of assessment of damage caused to property Ex.29.

(3) Copy of dying declaration of Urmilaben Govindbhai, got produced by accused at Ex.31.

(4) Sketch with explanatory note of scene of offence and surrounding properties Ex.36.

(5) Certificate of injuries sustained by accused No.1 Babubhai Laxmanbhai Ex.38.

(6) A bunch of medical case papers of Urmilaben Govindbhai Ex.41.

(7) A refer note of Medical Officer, Mangusi General Hospital, Bilimora issued to C.M.O. Civil Hospital, Navsari along with a bunch of medical case papers of deceased Govindbhai, Ex.42 collectively.

(8) Post Mortem Notes Ex.43.
(9) Certificate with regard to cause of death of deceased Govindbhai Ex.44.

(10) Original complaint Ex.47.
(11) Yadi of P.S.O. Navsari Town Police Station addressed to Executive Magistrate Ex.50.

(12) Dying declaration of injured Urmilaben Ex.51 produced and proved by Executive Magistrate.

(13) Dying declaration of deceased Govindbhai Ex.52.

(14) Forwarding letter addressed to Forensic Science Laboratory Ex.55.

(15) Report of Forensic Science Laboratory Ex.56.

#. On evidence of prosecution being declared as closed, the learned Judge of the trial Court recorded further statements of each accused separately. Circumstances appearing against the accused were brought to the notice of and explained to each accused in their respective further statements recorded under Sec.313, Cr.P.C.

##. All the accused have mechanically denied the case of the prosecution. Still however, they have admitted following facts in their further statements:

(1) Accused No.1 is an elder brother-in-law of Urmilaben and accused Nos. 2,3 and 4 are the son, wife and daughter-in-law of accused No.1.

(2) Urmilaben was residing with her husband in their own house situated in village Sari-bujarang and their house was adjacent to house of the accused.

(3) The house in which Urmilaben, her husband -deceased and accused were residing, was of the ownership of Laxmanbhai -father of the deceased and accused No.1.

(4) Urmilaben and deceased had sustained bodily burn injuries but it is their defence that they sustained such injuries in the accident.

(5) At about 2-00 a.m. in the early morning of 10/2/1995, witness Police Constable Ashokbhai in company of other police persons was on night petrolling duty and when they were passing near corner of "Teachers' Society", they saw that one hut had caught fire from its top portion, and therefore, that police persons halted their vehicle at that place. At that time, there was one bang and they heard cries of one woman and one male person for help, from inside the hut. Thereupon, they went near the gate of that hut and tried to open the doors of the hut but they found that one wire was wounded-up in front portion of the gate. They opened the wire and on opening the doors of the hut, first one lady came out from the hut and by following her, one male person who had sustained burn injuries came out from the hut.

(6) It is their common defence that deceased and Urmilaben were keeping enimical relations with them (accused) and therefore, Urmilaben has given a false evidence.

(7) Accused Nos. 1 and 3 have in their own defence stated in their further statements that they are residing in their own separate house and that they had no dispute whatsoever with deceased Govindbhai. They have also stated that their son

Aswin and Anitaben (Aswinbhai's wife) are staying separately from them in Gayatri Society and Aswinbhai is carrying on his own business.

(8) When accused No.1 was heard on point of quantum of sentence, he has stated "He is an aged old person having disease of laprocy.

(9) Accused Nos. 2 and 4 have in their defence stated that they are residing separately from accused Nos. 1 and 3, in Gayatri Society since 1/5/1987 and that accused no.2 is doing his own business.

(10) Accused have submitted their written arguments at ex.59.

##. After hearing the arguments of learned Advocates for both the parties and after analysing and appreciating evidence led by the prosecution, the learned Judge of the trial Court came to a conclusion that the deceased Govindbhai died culpable homicidal death and because of pouring petrol on the deceased Govindbhai and Urmilaben and by throwing on them an ignited match-stick by accused no.1, deceased Govindbhai sustained severe bodily burn injuries and as a direct result of these burn injuries, Govindbhai died and therefore, accused No. 1 has committed an offence punishable under Sec.302, I.P.Code. He has further come to a conclusion that because of aforesaid acts of accused No.1, Urmilaben sustained such severe bodily burn injuries which were in ordinlary course of nature sufficient to cause her death but because of timely treatment, she has survived, and therefore, accused No.1 has committed an offence punishable under Sec.307, I.P.Code. He has also come to a conclusion that because of aforesaid acts, the house and household articles of deceased and Urmilaben caught fire and in that fire, the house and household articles were heavily damaged and destroyed, and therefore, he has committed an offence punishable under Sec. 436, I.P.Code. By appreciating the evidence, he has come to a conclusion that accused Nos.2 to 4 have not abetted the accused No.1 in committing the aforesaid offences punishable under Secs. 302-307 and 436 of I.P.Code, and therefore, the learned Judge of the trial Court has, by rendering judgment Ex.60 dated 19/6/1997, convicted the accused No.1 and inflicted sentences as referred to in Para. 2 hereinabove. Simultaneously, by not holding accused Nos. 2 to 4 guilty for the offences for which they were charged, the learned Judge of the trial Court has acquitted the accused Nos. 2 to 4 of offences of

abetment in committing the offences committed by accused No.1.

##. Being aggrieved against and dissatisfied with aforesaid judgment of conviction and sentence, accused No.1 has preferred Criminal Appeal No. 745 of 1997, while the State of Gujarat has preferred an appeal being Criminal Appeal No. 1137 of 1997 against accused Nos. 2 to 4.

##. We have heard Mr.P.M.Vyas, learned Advocate for the appellant (original accused No.1) in Criminal Appeal No. 745 of 1997 and Mr. D.R.Bhatt, learned Advocate for the respondents (original accused Nos. 2 to 4) in Criminal Appeal No. 1136 of 1997 and Ms. B.R.Gajjar, learned APP for the State in both the appeals in detail at length.

##. Mr.P.M.Vyas, learned Advocate for the appellant (original accused No.1) in Criminal Appeal No. 745 of 1997 has taken us through the oral as well as documentary evidence on record and the impugned judgment challenged in these appeals. Mr. Vyas, learned Advocate for the convict accused No.1 has argued that the learned judge of the trial Court has not appreciated the evidence in its proper and correct perspective manner and that he has come to a wrong conclusion, and therefore, the order of conviction passed against the accused No.1 is erroneous and bad in law. He has further argued that story advanced in the complaint is highly improbable and in view of probability factor with regard to nature of incident, the deposition of Urmilaben cannot be accepted as true and credit-worthy. He has further argued that the prosecution has changed the story from one stage to another by advancing the case that accused poured petrol on deceased and Urmilaben and lateron they have changed the story by saying that Kerosene was poured, and therefore, the case has become doubtful. He has further argued that looking to the facts and circumstances of the case, the dying declaration on which the learned Judge of the trial Court has placed reliance for convicting accused No.1, is far from truth and unreliable. It cannot be said to be genuine, reliable and trustworthy. He has further argued that in view of this, if the dying declarations are taken out from the evidence, then there is no evidence against the accused No.1 and therefore, the appeal preferred by accused No.1 deserves to be allowed and accused No.1 who is a patient of leprosy, be acquitted.

##. Mr. P.M.Vyas has placed reliance on following authorities in support of his submissions. They are:

(1) Thanedarsing Vs. State of U.P. reported in 2002 SCC (Cri.) 153;

(2) Kajal Sen and others Vs. State of Assam, 2002 SCC (Cri.) 452 = 2002 (2) SCC 551.

(3) Hasmukh Devji Khavasa Vs. State of Gujarat, 1997 (1) GCD 305 (Guj).

(4) Dilip Vs. State of Maharashtra, 1996(1) (Crimes) 483 (Bombay).

(5) Surendra Pratap Chauhan Vs. Ram Naik and others, (2001) 9 SCC 266.

(6) Kalyan and others Vs. State of U.P. (2001)9 SCC 632.

(7) Laxmi (Smt) Vs. Om Prakash and others, (2001) 6 SCC 118.

(8) Swapan Patra and others Vs. State of W.B. 1999 SCC (Cri) 1153.

##. Ms. B.R.Gajjar, learned APP for the State has supported judgment of conviction qua accused No.1. She has argued that there is ample evidence against accused No.1 for holding him guilty for an offence punishable under Secs. 302-307-436 of I.P.Code. She has further argued that the learned Judge of the trial Court has properly appreciated the evidence on record in its correct perspective and has rightly convicted accused No.1. Still however, as Counsel for the State representing the appellant in Criminal Appeal No. 1137 of 1997, she has argued that the learned Judge of the trial Court has not properly and correctly appreciated the evidence of two dying declarations and oral evidence of P.W. Urmilaben and the learned Judge of the trial Court has, though he accepted two dying declarations to be acceptable and trustworthy statements, acquitted the accused Nos. 2 to 4 by misreading the evidence on record. She has argued that looking to the dying declaration of the deceased Govindbhai and oral evidence of Urmilaben who is an injured eye-witness, it can certainly be said that the judgment of acquittal in favour of accused Nos. 2 to 4 is palpably wrong and it is unsustainable and the judgment of acquittal rendered in favour of accused Nos.2 to 4, is required to be reversed by this Court by convicting accused Nos. 2 to 4. She has cited following three authorities in support

of her submissions:

(1) State of Maharashtra Vs. Krishnamurti Laxmipati Naidu, AIR 1981 SC 617.

(2) Sheelam Ramesh & another Vs. State of Andhra Pradesh, AIR 2000 SC 118.

(3) Shamu Balu Chaugule Vs. State of Maharashtra, AIR 1976 SC 557.

##. Shri D.R.Bhatt, learned Advocate appearing for respondents (Original accused Nos. 2 to 4) in Criminal Appeal No. 1137 of 1997 has taken us through certain portions of oral evidence of witnesses and documentary evidence. He has supported the judgment of acquittal rendered in favour of accused Nos. 2 to 4. He has argued that Criminal Appeal No. 1137 of 1997 is an acquittal appeal filed by the State of Gujarat and considerations for such acquittal appeals are totally different than the considerations which can be taken into account while dealing with the conviction appeals. He has cited following two authorities:

(1) Ramesh Babulal Doshi Vs. State of Gujarat, 1996(2) GLH 206 (SC).

(2) Solanki Chimanbhai Ukabhai Vs. State of Gujarat, AIR 1983 SC 484.

(3) Smt. Kamla Vs. State of Punjab, AIR 1993 SC 374.

##. We have considered the submissions advanced at the Bar. We have carefully examined the evidence on record and re-appreciated the same in light of submissions made by both the parties.

##. General principles with regard to appreciation of evidence and Court's approach are restated by Hon'ble Supreme Court in case of Harijan Thirupala and others Vs. Public Prosecutor, High Court of A.P. Hyderabad, reported in (2002) 6, SCC 470.

In our administration of Criminal justice, an accused is presumed to be innocent unless such a presumption is rebutted by the prosecution by producing the evidence to show him to be guilty of the offence with which he is charged. Further, if two views are possible on the evidence produced in the case, one indicating to

the guilt of the accused and the other to his innocence, the view favourable to the accused is to be accepted. In cases where the Court entertains a reasonable doubt regarding the guilt of the accused, the benefit of such doubt should go in favour of the accused. At the same time, the Court must not reject the evidence of the prosecution taking it as false, untrustworthy, or unreliable on fanciful grounds or on the basis of conjuctures and surmises. The case of the prosecution must be judged as a whole having regard to the totality of the evidence. In appreciating the evidence, the approach of the Court must be integrated not truncated or isolated. In other words, the impact of the evidence in totality on the prosecution case or innocence of the accused has to be kept in mind in coming to the conclusion as to the guilt or otherwise of the accused. In reaching a conclusion about the guilt of the accused, the Court has to appreciate, analyse and assess the evidence placed before it by the yardstick of probabilities its intrinsic value and the animus of witnesses. It must be added that ultimately and finally, the decision in every case depends upon the facts of each case.

##. This is a case in which deceased Govindbhai and injured Urmilaben who were sleeping on cot covered with Mosquito-net in their house, caught fire and sustained serious bodily burn injuries. Incident took place at about 2-00 a.m. in the mid-night. Under the circumstances, there cannot be a direct evidence of any third party as an eye-witness. The whole case rests on dying declarations and complaint.

(1) Oral dying declarations made to P.W.8 Dr.Ajaykumar Jankiprasad Sharma by both the injured witnesses. That Dr. Sharma reduced that statements as a history given, by them, into writing by preparing medical case papers.

(2) Complaint Exh.47 lodged by deceased Govindbhai to P.W. 9 P.S.I. Henri Jullius Kin.

(3) Dying declaration Ex.52 of deceased Govindbhai recorded by Executive Magistrate Mohanbhai Kikabhai Mistry (Ex.49).

##. Before we start to discuss the evidence led by the prosecution, it is necessary to know as to how and under what circumstances, incident took place on fateful day of 10-02-1995.

21.1 P.W. 2 Urmilaben and her husband Govindbhai both were having their own house. Their house was nothing but one of the two parts of house. They were residing in northern part. Partition of galvanized iron sheets was there in between two parts of house. The southern part, as a result of such partition, was in use of the accused Nos. 1 and 3. Both the portions have a common loft. Both the portions have their outlets on western side. The southern portion which was being used by accused nos.1 and 3 has its another outlet on eastern side, also. These two portions are made from one big room. Each such part is of area of 11' x 6.1/4'. Towards east of this big room, there is one another room having its gate towards eastern side. This second room towards east is also in possession of the accused. As per story unfolded by P.W.2 Urmilaben, the house in which they were residing was of ownership of her father-in-law. She has deposed in her evidence that accused wanted to snatch the possession of their house in which they were residing and for that they (accused) were threatening to kill them. So, on the point of motive, the prosecution has given the history that the deceased Govindbhai and his wife Urmilaben both were residing in northern portion of room of the house and except this premises, they had no other premises as their shelter. They have no child except one daughter to whom they have got married and she is residing with her husband abroad in Africa. Under these circumstances, it is a case of the prosecution that accused have their premises on southern portion of that premises on northern side which is in possession of deceased as well as another house on eastern side adjacent to that house, and therefore, they wanted to snatch the possession of the house from the deceased. As per evidence of Urmilaben, when they were sleeping in their house, at about 2-00 a.m. in the mid-night they heard some noise from the loft and her husband saw with the help of torch light, inside the loft and they saw all the four accused who were present in the loft and they poured petrol over the deceased Govindbhai and Urmilaben and thereafter they threw an ignited match-stick on them, as a result of which they caught fire and they sustained serious bodily burn injuries. As per the case of the prosecution, deceased Govindbhai had sustained more severe burn injuries and therefore, during the course of medical treatment in the Civil Hospital at Navsari, Govindbhai expired on 12/2/1995. As stated earlier, it is clear from further statements of the accused that the accused have no dispute with regard to fact of burn injuries sustained by Urmilaben and her husband while they were in their house. It is only their defence that they caught fire as a result of accident. It is their

say that because of dispute with regard to property, deceased Govindbhai and injured Urmilaben were keeping enimical relations with them and therefore both have given their names in their dying declarations. It is an admitted fact that after incident, P.W. 3 Valiuddin shifted injured Urmilaben and injured Govindbhai first to Government Dispensary at Amalsad, but Doctor of Government Dispensary, Amalsad referred that two injured persons to Mengusi General Hospital at Bilimora and from there they were further referred to Civil Hospital, Navsari. They were admitted in Civil Hospital, Navsari. Urmilaben took medical treatment as an indoor patient for the period upto 26/4/1995. It is not in dispute that injured Govindbhai - husband of Urmilaben died during the course of medical treatment at 4-10 a.m. on 12/2/1995. As per the case of the prosecution, inquest panchnama Ex.17 was drawn on 12/2/1995 during the period from 9-45 a.m. to 10-15 a.m. by P.W.9 Mr. Henri Jullius Kin, Police Sub Inspector, Navsari Town Police Station. Deceased Govindbhai had sustained burn injuries on his head portion, face, two ears, two arms, right waist portion, right thigh, left thigh, right knee etc. As per evidence of P.W.8, Dr. Ajaykumar Sharma who examined Urmilaben and Govindbhai, both were brought to him in Civil Hospital, Navsari at 5-00 a.m. on 10/2/1995. He has produced a bunch of five medical case papers at Ex.42. As per his deposition, Govindbhai had sustained following burn injuries:

"2nd and 3rd degree burns on face, scalp, abdomen, rear portion of body, both arms and on both palms."

During treatment, deceased Govindbhai died and this very Dr. Sharma performed Post Mortem of the deceased. He has produced and proved Post Mortem Notes Ex.43. As per his evidence, following were the external injuries found on the body of the deceased:

"2nd and 3rd degree burns over scalp, whole of face, front and back of neck, upper part of front of chest. Both upper limb front & back, whole of part of chest and abdomen. Right side of frontal chest and abdomen. Lateral aspect of left thigh upper half."

He has given cause of death as follows:

"Cardio respiratory arrest produced by septicaemic shock due to burns".

This Doctor has given a separate death certificate stating cause of death at Ex.44. Thus looking to aforesaid evidence of P.W.8 Dr. Sharma read with Post Mortem Notes Exh.43, the prosecution has ably proved that deceased Govindbhai died a homicidal death. The only defence taken by the accused is to the effect that when Govindbhai and Urmilaben were inside the hut, hut suddenly caught fire by accident and in that accidental fire, both had sustained injuries. They have advanced their case that though the death of Govindbhai is a homicidal death, it cannot be said to be a culpable homicidal death because he met with an accident which took place as hut caught fire by accident, and thus, in this case, there is no serious dispute about homicidal death of deceased Govindbhai.

##. This takes us to a point for determination as to how Govindbhai sustained bodily burn injuries. As per the case of the prosecution, accused poured petrol on Govindbhai and Urmilaben and threw an ignited match-stick on them, while they were sleeping in hut. As against this, it is the defence of the accused that they are not involved in any way in the incident and merely because, deceased and Urmilaben were keeping enemical relations, with regard to property dispute, deceased having animosity has given false complaint against the accused. As per their case, hut caught fire by accident, and therefore, as per defence of accused, this is a case of accidental death and not a culpable homicidal death.

##. On making our careful examination of evidence on record and submissions made by the learned Advocates for both the parties, it is revealed that the prosecution mainly relies on three dying declarations of deceased Govindbhai and oral testimony of P.W. 2 Urmilaben. Prosecution indirectly relies on a so called dying declaration Exh.51 of Urmilaben recorded by the Executive Magistrate. We have not considered socalled dying declaration of Urmilaben recorded by Executive Magistrate because Urmilaben is surviving and has given evidence before the trial Court, and therefore, at the best that statement of Urmilaben recorded by the Executive Magistrate is nothing but a previous statement under Sec.157 of the Indian Evidence Act. In view of this, first we will consider the evidence of dying declaration of Govindbhai.

##. There are three dying declarations of deceased Govindbhai and they can be arranged in Chronological order of time as follows:

(1) Page 3 of Ex.42 which is in form of history given by Govindbhai to P.W.8 Dr. Sharma at 05-15 a.m. on 10-02-1995.

(2) Complaint Ex.47 recorded by P.W.9 P.S.I. Mr. Kin who is examined at Ex.46, at about 08-15 a.m. on 10-02-1995.

(3) Statement Ex.52 recorded by Mr.Mistry, Executive Magistrate who is examined at Ex.49 during the period between 09-45 a.m. and 10-05 a.m. on 10-02-1995.

##. Thus, the prosecution relies on aforesaid three dying declarations of deceased Govindbhai. Hence there are more than one dying declarations on record. Before we discuss the evidence of the dying declarations with regard to its acceptability and reliability, we would like to place on record legal position with regard to dying declarations. It is well settled principle of law that a dying declaration, whether oral or written, is a relevant piece of evidence under Sec.32(1) of the Indian Evidence Act. Dying declaration is made relevant piece of evidence on the basis of well-known maxim "nemo moriturus mentire- no one at the point of death is presumed to lie. A man will not meet his Maker with a lie in his mouth"is the philosophy in law underlying admittance in evidence of dying declaration.

##. A dying declaration not being a deposition in court, neither made on oath nor in the presence of the accused and therefore not tested by cross-examination is yet admissible in evidence as an exception to the general rule against the admissibility of hearsay. The admissibility is founded on the principle of necessity. A dying declaration, if found reliable, can form the basis of conviction. A court of facts is not excluded from acting upon an uncorroborated dying declaration for finding conviction. A dying declaration, as a piece of evidence, stands on the same footing as any other piece of evidence. It has to be judged and appreciated in the light of the surrounding circumstances and its weight determined by reference to the principles governing the weighing of evidence. It is as if the maker of the dying declaration was present in the court, making a statement, stating the facts contained in the declaration, with the difference that the declaration is not a statement on oath and the maker thereof cannot be subjected to cross-examination. The weak points of a dying declaration serve to put the court on its guard while testing its reliability and impose on the court as

obligation to closely scrutinise all the relevant attendant circumstances. If in a given case a particular dying declaration suffers from any infirmities, either of its own or as disclosed by other evidence adduced in the case of circumstances coming to its notice, the court may as a rule of prudence look for corroboration and if the infirmities be such as render the dying so infirm as to prick the conscience of the court, the same may be refused to be accepted as forming a safe basis for conviction.

##. One of the important tests of the reliability of the dying declaration is a finding arrived at by the court as to satisfaction that the deceased was in a fit state of mind and capable of making a statement at the point of time when the dying declaration purports to have been made and/or recorded. The statement may be brief or longish. It is not the length of the statement but the fit state of mind of the victim to narrate the facts of occurrence which has relevance. If the court finds that the capacity of the maker of the statement to narrate the facts was impaired or the court entertains grave doubts whether the deceased was in a fit physical and mental state to make the statement the court may in the absence of corroborating evidence lending assurance to the contents of the declaration refuse to act on it.

##. It is not the number of dying declarations which will weigh with the court. A singular dying declaration not suffering from any infirmity and found worthy of being relied on may form the basis of conviction. On the other hand, if every individual dying declaration consisting in a plurality is found to be infirm, the court would not be persuaded to act thereon merely because the dying declarations are more than one and apparently consistent.

##. A dying declaration made to a police officer is admissible in evidence, however, the practice of dying declaration being recorded by an investigating officer has been discouraged and the Supreme Court has urged the investigating officers to avail the services of a Magistrate for recording dying declaration if it was possible to do so and the only exception is when the deceased was in such a precarious condition that there was no other alternative left except the statement being recorded by the investigating officer or the police officer.

##. A law relating to dying declaration has been well-discussed by the Hon'ble Supreme Court in the case

of Khushal Rao Vs. State of Bombay, reported in AIR 1958 SC 22. This is a pioneer case on dying declaration. In Para 16, the Hon'ble Supreme Court has come to certain conclusions as follows:

"On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid,

(1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated.

(2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made;

(3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence;

(4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence;

(5) that a dying declaration which has been recorded by a competent magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and

(6) that in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time of he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying

declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

##. Thereafter, in case of Smt. Paniben Vs. State of Gujarat, reported in AIR 1992 SC 1817, the Hon'ble Supreme has made a compilation of principles with regard to dying declarations laid down in different cases before it. It has been held in Para 17 as follows:

Though a dying declaration is entitled to great weight, it is worthwhile to note that the accused has no power of cross-examination. Such a power is essential for eliciting the truth as an obligation of oath could be. This is the reason the Court also insists that the dying declaration should be of such a nature as to inspire full confidence of the Court in its correctness. The Court has to be on guard that the statement of deceased was not as a result of either tutoring, prompting or a product of imagination. The Court must be further satisfied that the deceased was in a fit statement of mind after a clear opportunity to observe and identify the assailants. Once the Court is satisfied that the declaration was true and voluntary, undoubtedly, it can base its conviction without any further corroboration. It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence. The Court has laid down in several judgments the principles governing dying declaration, which could be summed up as under :

(i) There is neither rule of law nor of prudence that ding declaration cannot be acted upon without corroboration. (Mannu Raja v. State of U.P. (1976) 2 SCR 764):(AIR 1976 SC 2199).

(ii) If the Court is satisfied that the dying declaration is true and voluntary it can base conviction on it, without corroboration.(State of U.P. v. Ram Sagar Yadav, AIR 1985 SC 416: Ramavati Devi v. State of Bihar, AIR 1983 SC 164).

(iii) This Court has to scrutinise the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination. The deceased had opportunity to observe and identify the

assailants and was in a fit state to make the declaration. (Rama Chandra Reddy v. Public Prosecutor, AIR 1976 SC 1994).

(iv) Where dying declaration is suspicious, it should not be acted upon without corroborative evidence.(Rasheed Beg v. State of Madhya Pradesh, (1974) 4 SCC 264: (AIR 1974 SC 332).

(v) Where the deceased was unconscious and could never make any dying declaration the evidence with regard to it is to be rejected.(Kake Singh v.State of M.P., AIR 1982 SC 1021).

(vi) A dying declaration which suffers from infirmity cannot form the basis of conviction.(Ram Manorath v. State of U.P. 1981 SCC (Cri) 581).

(vii) Merely because a dying declaration does not contain the details as to the occurrence, it is not to be rejected.(State of Maharashtra v. Krishnamurthi Laxmipati Naidu, AIR 1981 SC 617).

(viii) Equally, merely because it is a brief statement it is not be discarded. On the contrary, the shortness of the statement itself guarantees truth. (Surajdeo Oza v. State of Bihar, AIR 1979 SC 1505).

(ix) Normally, the Court in order to satisfy whether deceased was in a fit mental condition to make the dying declaration look up to the medical opinion. But where the eye-witness has said that the deceased was in a fit and conscious state to make this dying declaration, the medical opinion cannot prevail.(Nanahau Ram v. State, AIR 1988 SC 912).

(x) Whether the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon.(State of U.P. v. Madan Mohan, AIR 1989 SC 1519).

##. In view of aforesaid legal position with regard to dying declaration, now we will examine three dying declarations on record. The first dying declaration is oral dying declaration made to P.W.8 Dr. Sharma who in tern reduced it into writing as per history given by deceased Govindbhai. Whether Govindbhai was in fit state ofmind at the time of giving history, we have to examine the evidence of Dr. Sharma.

##. It is not in dispute that P.S.O. of Navsari Town Police Station wrote a YadiEx.50 to the Executive Magistrate, Navsari first to Dr. Sharma and Dr. Sharma put an endorsement in the margin of Ex.50 to the effect that the patient was conscious and can speak and on the basis of such statement, the Executive Magistrate recorded the dying declaration. This endorsement was made by Doctor at about 8-30 a.m. We have to ascertain as to whether the deceased Govindbhai was in fit state of mind when he gave history to Dr. Sharma. A question was put to Dr. Sharma by the learned Advocate for the accused in cross-examination of Dr. Sharma and in reply to that question, Dr. Sharma has deposed specifically that he examined the patient and the patient himself gave history and therefore, he (patient) was in fit state of mind to understand. If this is an answer given by Dr. Sharma in his cross-examination, then there is no point to disbelieve him with regard to condition as to fit state of mind of Govindbhai when he gave history to Dr. Sharma.

##. This oral statement made by deceased Govindbhai to Dr. Sharma which ultimately came to be reduced into writing in medical case papers, is first in point of time in comparison to other two dying declarations. Dr. Sharma is a neutral person having no interest either in complainant or disfavour for accused. While performing his official duty, he asked deceased Govindbhai about history of injury to Govindlbhai and whatever answer was given by the deceased Govindbhai was taken down by him. If we examine that dying declaration which is in the form of history and which was reduced into writing by Dr. Sharma, we find that Govindbhai did not disclose the name of his brother, and therefore, naturally there is no reference of name of miscreant who got the complainant burnt. The complainant stated to Dr. Sharma that hut was set on fire by his elder brother. It is not the case of the accused No.1 that Govindbhai had any other elder brother other than the accused No.1. Urmilaben who is the wife of Govindbhai has deposed in her evidence that accused Babubhai is an elder brother of her husband. What is stated by Govindbhai to Dr. Sharma, stands corroborated by oral statement made by Urmilaben to that very Dr. Sharma. As per history given by Urmilaben to Dr.Sharma, she stated to Dr. Sharma that hut was set on fire by her brother-in-law. It is not the case of the accused that Govindbhai has any other brother other than accused No.1. In complaint Ex.47, Govindbhai has described Babubhai Laxmanbhai as his elder brother. The presence of accused No.1 at the time of incident of

setting fire to house in which Govindbhai and Urmilaben were residing, is also proved by that complaint ex.47 as well as dying declaration Ex.52 of the deceased.

##. It is the case of the prosecution that in this incident, when the house was ablaze, accused No.1 had sustained burn injuries. As per evidence of Investigating Officer, P.S.I. Mr. Navinchandra Vitthalbhai Desai (Ex.54), he arrested the accused on 13/2/1995 under arrest panchnamas Exs.18 and 19 i.e. next day after Govindbhai died. After arrest, police, along with Yadi, brought the accused No.1 before P.W. 6 Dr. Jagdishprasad Ramsing Gupta, Medical Officer of Secondary Health Center, Gandevi (Ex.37). Accused No.1 was produced before him at 11-00 a.m. He examined accused No.1 and he found following injuries on the body of accused No.1 for which a Medical Certificate has been issued by him at Ex.38.

1. Epidermal burn over frontoparietal region of scalp 2" x 2" Necrotic substance intermigled with oint at the margin of burn. A dry brown crust over the burn is present with is adhere to the surface.

2. Blackening of the skin above & around the burn (1) with singening of hair around the area.

3. Redness & blackening over Lt. side of forehead about one 1" above the medial 1/2 of left eye brow 1/2" x 1/2".

middle 1/3 part of upper lip & lateral 1/3 of lower lip is covered with crust epidermal burn over Lt. side of face below the Lt. eye 2 cm x 1/2 cm skin around the burn -Blackening & Redness present. Skin adjacent to the above burns can be peeled.

Vital reaction line of redness present.

Duration of burn

2. Approximately is -48 to 72 hours.

3. First & Second degree burn (Epidermal) less than 5%.

Nature of injury- Simple."

##. As per evidence of Dr. Gupta, present accused No.1 had given the history to him that two days before, he was burnt in fire. He was examined on 13/2/1995, and therefore, according to accused No.1, he sustained burn injuries before two days i.e. on or about 10/2/1995. Accused No.1 has not explained his injuries which are stated in Ex.38, and therefore, presence of accused No.1 at the place of incident is established. Learned Advocate Shri P.M.Vyas has argued that Urmilaben has admitted in her cross-examination that accused Babubhai was burnt before the incident and that Babubhai was burnt when he was extinguishing fire set on to her house. He has, by taking some evidence from here and there, from the deposition of Urmilaben, argued that one cannot come to a conclusion that he was burnt during the incident. We have to read evidence of Urmilaben as a whole without splitting it in fractions. A case was suggested to Urmilaben that one Bachubhai and Kirtiben were fetching water and supplying to Balbubhai and Babubhai was extinguishing the fire. To this suggestion, Urmilaben has in natural course said that she did not know about said suggested fact. As discussed earlier, presence of Govindbhai and Urmilaben in the house which was ablaze is not in dispute. It is proved by two police personnel namely Valliuddin and Ashokbhai, because they reached immediately when the house was actually put to fire. As per evidence of Valliuddin, Ashokbhai broke opened the doors of house from which they heard cries of woman and male person. As per his evidence, on breaking open the doors, first one lady came out from the house and immediately thereafter one man followed her and both were burning. Thus, presence of two injured persons in the house is established. The prosecution has ably proved the presence of accused No.1 at the place by examining Dr. Gupta at Ex.37 and proving Medical Certificate Ex.38, and therefore, there is no reason to disbelieve the first dying declaration in point of time which was recorded by Dr. Sharma. By this dying declaration, both Govindbhai and Urmilaben have stated that accused No.1 set their house on fire. If we examine two statements -dying declarations viz. Ex.47 and Ex.52, we find that name of accused No.1 was very much mentioned by the deceased Govindbhai and thus, the learned Judge of the trial Court has rightly appreciated the evidence and has come to a conclusion that the accused No.1 had set fire to the house in which deceased Govindbhai and injured Urmilaben sustained burn injuries. He has rightly placed reliance on dying declaration (Page 3 of Exh.42) which was first in point of time. In case of Smt. Paniben (supra), the Hon'ble Supreme Court has held in Para 18 as follows:

"In the light of the above principles, we will consider the three dying declarations in the instance case and we will ascertain the truth with reference to all dying declarations made by the deceased Bai Kanta." This Court in Mohan Lal V. State of Maharashtra, AIR 1982 SC 839 held:

"Where there are more than one statement in the nature of dying declaration, one first in point of time, must be preferred."

"Of course, if the plurality of dying declarations could be held to be trust-worthy and reliable, they have to be accepted."

##. In view of above legal position, if there are more than one statements in the nature of dying declaration, one i.e. first in point of time must be preferred. The Hon'ble Supreme Court has further held that if there are more than one dying declarations and if they are found to be trust-worthy and reliable, then other dying declarations can also be accepted. Here in this case, first dying declaration was recorded at 5-15 a.m. i.e. within about two hours, second dying declaration Ex.47 was recorded by Police Inspector P.W.8 Mr.Kin at about 8-15 a.m. i.e. about five hours after the incident and the third dying declaration Ex.52 was recorded by Executive Magistrate at about 9-20 a.m. i.e. about six hours after the incident.

##. Shri D.R.Bhatt, learned Advocate for accused Nos. 2 to 4 has argued that if really, other three accused namely A-2 to A-4, were with accused No.1, Govindbhai had no reason to ommit their names before Dr. Sharma. He could have well stated the names of A-2 to A-4 to Mr. Sharma when he gave the history. He has argued that from the evidence, it is established that there was a dispute which was going on in between Govindbhai and the accused for the house and as stated by Govindbhai in his complaint, prior to the day of incident, frequently there were quarrels in between the complainant and accused for evition of house. It is also stated by the complainant in his complaint that he was also beaten by the accused for which a complaint was lodged. P.W. 2 Urmilaben has also deposed that accused wanted the possession of the house in which they (deceased and Urmilaben) were staying and they (accused) were giving threates to them that they would kill them. Thus, the relations of deceased and accused were not cordial. Relations were strained. Disputes were going on. Sometimes, the complainant was

beaten by accused for evicting the deceased from the house. In view of this, relations were enemical and in view of such type of relations, Govindbhai and Urmilaben having animosity had sufficient time to think over after first dying declaration was recorded. Admittedly, after giving preliminary treatment by Dr. Sharma, both were admitted in the Civil Hospital at Navsari and they had all chances to talk with each other, and therefore, that possibility cannot be ruled out that they thought it fit to give names of Accused Nos.2 to 4 involving them in the incident. Looking to the time gap in between first statement and second statement Ex.47, this possibility cannot be ruled out because second dying declaration was recorded by Police Inspector Mr.Kin. Therefore, three hours after first statement, complainant mentioned names of Accused Nos. 2 to 4 in his complaint Exh.47 which was recorded by Mr. Kin and subsequently, the Executive Magistrate recorded the dying declaration Ex.52 one hour after recording of Exh.47. Looking to enemical relations in between accused and the complainant (deceased Govindbhai), possibility of implicating accused Nos.2 to 4 in the commission of offence, by Urmilaben and deceased Govindbhai lateron cannot be ruled out. Under the circumstances, involvement of accused No.1 is very much established by first dying declaration but by tendering evidence of second and third dying declarations, involvement of accused nos.2 to 4 has become doubtful. Shri Bhatt has argued that on examining the probability factor with regad to actual happening of the incident, it is not possible that four persons could be accommodated at a time in the loft of a Kachcha hut as discribed in the explanatory note at Item No.8 in map Ex.38. As per Panchnama Exh.29, loft was at a height of 6' from floor of room and top of hut was at a height of 5' from loft. Loft was made of Bamboos. Wooden planks in large number were placed in that loft. House which was ablaze was not a pucca building made of bricks and cement. It was a kachcha hut. If we read panchnama Ex.28, we find that entire house was burnt. As per Panchnama Exh.28, northern side well of room in which deceased was residing was made with chips of bamboos and that was also burnt. Two rooms were made by making partition of galvanized iron sheets. Part on northern side was in possession of Govindbhai, while part on southern side was in possession of accused nos.1 and 3. Even the deceased stated in his first statement before Dr. Sharma that it was a hut which was set on fire by his elder brother. In view of this, when a loft was made of bamboos loaded with wooden planks in the kachcha hut, it is not possible that for four persons to stand on such loft, and therefore, the story which has been subsequently changed in other two

dying declarations Exs.47 and 52 is not probable. If subsequent two dying declarations Exs.47 and 52 are inconsistent with first dying declaration recorded by Dr. Sharma, then that subsequent two dying declarations cannot be accepted. Here in this case, subsequent two dying declarations are inconsistent with the first dying declaration (Page 3 of Exh. 42) on the point of involvement of miscreants who set fire to the hut.

##. In view of discussion made hereinabove, this Court is of the view that subsequent two dying declarations i.e. Exh.47 and Exh.52 cannot be accepted as trustworthy and reliable piece of evidence, because in subsequent two dying declarations, Govindbhai has implicated A-2 to A-4, though he did not state their names to Dr. Sharma, and therefore, the learned Judge of the trial Court has rightly placed reliance on first dying declaration i.e. history given by deceased Govindbhai to Dr. Sharma who immediately reduced that history into writing on Page 3 of Exh.42.

##. Ms. B.R.Gajjar, learned APP for the State has argued that the learned Judge of the trial Court has, without assigning reasons, ignored the evidence of injured eye-witness P.W.2 Urmilaben. P.W.2 Urmilaben who is a victim and eye-witness to the incident has narrated the entire story of incident as per story narrated in the complaint Exh.47 lodged by her husband. In her evidence, she has implicated A-2 to A-4 along with A-1 stating that these four accused poured Kerosene on them from the loft and some one of them threw an ignited substance on them, as a result of which their house was ablaze and in this incident, she sustained serious burn injuries. At this stage, it is required to know as to what type of injuries she had sustained.

##. As per deposition of Dr. Ajaykumar Sharma, Urmilaben sustained 2nd and 3rd degree burns on face, both upper limbs, over back of chest. As per case papers Exh.41, she has sustained 45% to 55% burns of 2nd and 3rd degree. Immediately after the incident, she made a statement to Dr. Sharma in Civil Hospital, Navsari by way of giving a history. Dr. Sharma has recorded that history on 4th Page of Medical Case Papers Ex.41. As per evidence of Dr. Sharma, on 10/2/1995, he was on duty as Medical Officer in Civil Hospital at Navsari and on that day at 5-00 a.m. Police had brought two patients named Urmilaben and Govindbhai who had sustained burn injuries with a refer note Ex.42 issued by Mengusi Hospital. He had examined these two persons. He has deposed that Govindbhai had told him that his elder brother got him

burnt. Urmilaben told him that elder brother of her husband had got her burnt. Both the injured persons told him that their hut was set ablaze. This Dr. Ajaykumar Sharma has produced a bunch of 11 medical case papers of Urmilaben at Ex.47. Whatever history was given by Urmilaben to him was noted down by him in the medical case papers. A bunch of these medical case papers is at Ex.41.

##. If we read 4th Page of medical case papers at Ex.41, we find that Doctor noted down the history given by Urmilaben. That history reads as follows:

H/o."The hut lighted by her brother-in-law".

Likewise, Dr.Ajaykumar Sharma has produced a bunch of five medical case papers of Govindbhai at Ex.42. If we read 3rd page of medical case papers at Ex.42, we find that the Doctor had noted down the history given by Govindbhai which reads as follows:

H/o. "The hut lighted by his elder brother".

And therefore, at the earliest point of time, immediately after the incident, Urmilaben gave name of accused No.1 only to Dr. Sharma. Subsequently, time elapsed and development in history of prosecution case started to take place. As discussed earlier, deceased Govindbhai and Urmilaben were admitted in Civil Hospital at Navsari. P.W.8 Police Inspector Mr.Kin came to the Civil Hospital at Navsari and recorded the complaint of the deceased Ex.47 at 8-30 a.m. i.e. about five hours after occurrence of incident. As discussed earlier, relations of the deceased and Urmilaben on one side and accused on other side were not cordial but strained due to dispute with regard to property. As per the say of Urmilaben, the house in which they were residing was of ownership of her father-in-law, meaning thereby ownership of father of deceased Govindbhai and A-1. As per her say, all the accused any how wanted to grab the property by taking possession from the deceased. In view of this, possibility cannot be ruled out that by lapse of time both (deceased and Urmilaben) must have discussed with each other in the hospital, before Mr.Kin came to the deceased for recording his complaint and another possibility also cannot be ruled out that they might have decided to give names of A-2 to A-4 along with A-1 as persons who set fire to their house. From evidence, it appears that the deceased Govindbhai and Urmilaben both were truthful so far as name of miscreant is concerned till they gave name of A-1 to Dr. Sharma. Second dying

declaration of deceased Govindbhai is Ex.47 being a complaint recorded by Mr. Kin wherein for the first time, names of A-2 to A-4 appear to have been introduced by the complainant. Similarly, when police statement of Urmilaben was recorded by Mr.Kin, she also gave names of A-2 to A-4 along with A-1 who put their house on fire. Thus evidence of Urmilaben so far as case of giving names of miscreants is concerned is inconsistent with first statement given by Urmilaben to Dr. Sharma. Under the circumstances, evidence of Urmilaben, so far as it relates to involvement of A-1 to A-4 appears to be an after-thought and because of animosity between two factions, her testimony with regard to incident as to how it happened is consistent with the case advanced by the prosecution. Therefore, case advanced by the prosecution that Govindbhai and Urmilaben were sleeping on the cot covered with mosquito-net in their house and during night time at about 2-00 a.m. accused No.1 poured Kerosene on them and by throwing an ignited match-stick, the whole house of the deceased was set on fire in which she sustained burn injuries is proved by Urmilaben. Under the circumstances, we do not accept the testimony of Urmilaben so far as it relates to involvement of A-2 to A-4 in the crime. She has deposed in her evidence that accused No.2 Aswinbhai and accused No.4 Anitaben are residing in Gayatri Society which is at a distance of 1 Km. from their house. She has further deposed that since more than 8 to 10 years, A-2 and A-4 are staying separately from them in Gayatri Society and A-2 is doing his separate business. Under the circumstances, presence of A-2 and A-4 at odd hours in the night at the place of incident is doubtful. As discussed earlier, loft made of bamboos (vide Exh.29) was in the hut in such condition that it could not bear the load of four persons at a time in such type of loft. It seems that this is one of the reasons why the learned Judge of the trial Court has disbelieved the case against the accused Nos.2 to 4.

##. Shri P.M.Vyas, learned Advocate for the accused No.1 has argued that as per story unfolded by Urmilaben when their house was set on fire, they shouted for help and coincidently at that time, P.W.3 Valliuddin and P.W. 4 Ashokbhai both police personnel were passing in vehicle near the house which was set at ablaze and as discussed earlier, P.W.4 Ashokbhai broke opened the doors of that house and both came outside the house in burning condition. Thereafter, P.W.3 Valliuddin shifted them first to the Government Dispensary at Amalsad, and thereafter, Doctor of Government Dispensary at Amalsad referred two injured persons to Mengusi General Hospital at Bilimora and thereafter they were brought to the Civil

Hospital at Navsari. Shri P.M.Vyas has vehemently argued that Govindbhai and Urmilaben did not state anything about the incident either to P.W.2 Valliuddin or P.W.4 Ashokbhai and they even did not state anything about the incident to the Doctor of Government Dispensary at Amalsad or Doctor of Mengusi Hospital, Bilimora. At this stage, it is necessary to know as to what was their mental condition when they were brought to the Primary Health Center at Amalsad.

##. The prosecution has examined P.W.7 Dr. Dipakkumar Mohanlal Patel at Ex.39. Dr. Dipakkumar Mohanlal Patel has deposed that on 10/2/1995, he was serving as Medical Officer in Primary Health Center at Amalsad. On that day at about 3-00 a.m. police had brought one woman and one male person to him in jeep. Both the persons had sustained severe burn injuries, and therefore, he made them to drink water and then referred them to Mengusi General Hospital at Bilimora. He has admitted that he did not ask them as to how they sustained injuries. He has further deposed that police has recorded his statement.

##. What is deposed to by this P.W.7 Dr. Dipakkumar in his cross-examination is very much important and relevant to ascertain as to what was the physical and mental condition of both the injured persons. Dr. Dipakkumar has deposed that if a person catches fire by Kerosene or petrol, smell of Kerosene or petrol would emit from his body. He has further deposed that in this case, no smell of either Kerosene or petrol was emitting from the respective bodies of these two persons. He has further deposed that both the patients were in frightened condition and their mental condition was not such that they could reply. These two persons halted with him for about two to five minutes. He has further deposed that police person who had brought these two persons did not inform him about the incident.

##. In view of mental condition of both the injured persons immediately after the incident, possibly both could not have uttered anything about the incident to the persons with whom they came into contact, after the incident till Dr. Sharma examined them and recorded their history in the medical case papers, and therefore, it matters not much, if in this condition injured persons did not narrate anything about the incident to the persons with whom they came into contact, and therefore, this contention of Mr. P.M.Vyas is rejected. Shri P.M.Vyas, learned advocate for the accused No.1 has argued that in police statement and also in the

deposition of Urmilaben, she has stated that accused poured petrol from carboy on them and then threw an ignited match-stick. While in her so called dying declaration Ex.51, she has changed the story by saying that Kerosene was poured on them. This discrepancy is a material one and in view of this, case of the prosecution cannot be accepted for holding the accused No.1 guilty of offence for which he is charged.

##. Ms. B.R.Gajjar, learned APP has argued that Urmilaben is an ordinary rustic illiterate lady hailing from village and she had no occasion to purchase the petrol. Generally, she used to come in contact with Kerosene for household domestic use, and therefore, by mistake, she might have stated petrol in her police statement. This discrepancy will not affect material part of prosecution case from its root when she herself had seen the accused pouring some liquid on them and throwing an ignited match-stick on them. Immediately, after the incident, she might be under impression that it was a petrol, but lateron, she might have realised that it was not a petrol but it was a Kerosene. This discrepancy will not affect the case from its root, because the fact remains that her hut was set on fire and in that fire, she sustained bodily burn injuries as referred to in certificate Ex.32.

##. In this case, the Investigating Officer had collected some burnt clothes, coal of wood and ash of burnt articles from the scene of offence for the purpose of analysis when panchnama Ex.28 being the panchnama of scene of offence was drawn on 10/2/1995. That articles were sent under forwarding letter Ex.55 to Forensic Science Laboratory (for short "F.S.L."). As per report of F.S.L. Ex.56, the presence of residual dye of petrol was not found in the samples. Ultimately, an expert of F.S.L. has given an opinion that presence of residual petroleum hydro-carbons (like Kerosene) was seen in the samples, and therefore, as per Exh.56 issued by Assistant Director of F.S.L., Kerosene was used and accordingly, Urmilaben has stated about use of kerosene in her alleged dying declaration Ex.51. At this stage, it is made clear that so called dying declaration Ex.51 (copy of which is at Ex.31) cannot be said to be a dying declaration relevant under Sec.32 of the Indian Evidence Act because Urmilaben is surviving after sustaining burn injuries, and therefore, it is merely a previous statement of Urmilaben and this statement can only be used for the purpose of corroboration under Sec.157 of the Indian Evidence Act or for the purpose of contradiction under Sec.145 of the Indian Evidence Act. It may be noted that

the learned Advocate for the accused has brought on record certain portion from said alleged dying declaration Ex.51 of Urmilaben on record in Para 9 of her cross-examination, wherein she has admitted about the use of Kerosene in the incident, and therefore, when that portion has been brought on record in cross-examination of Urmilaben, that portion can be read as an evidence in the case in view of Sec.157 of the Indian Evidence Act and therefore, this discrepancy about use of nomenclature of liquid as used as inflammable liquid will not affect the case from its root. We know that petrol and kerosene both are inflammable liquid, and therefore, this discrepancy which is of a little significance can be ignored.

##. Mr.P.M.Vyas has argued that in the evening on previous day of the incident, when deceased Govindbhai and Urmilaben returned to their home, they smelt smell of Kerosene in their house. They did not take any action to inquire as to from where the smell of Kerosene was emitting. As urged by Mr. P.M.Vyas, in ordinary course of nature, a person would inquire as to where the Kerosene is spilt over and as to from which corner of the house, smell of Kerosene is emitting. He has further argued that in this case, both the husband and wife did not bother about this smell of Kerosene and quietly took their dinner and went to their bed in the night. He has argued that this conduct of Govindbhai and Urmilaben is unnatural and therefore, there is good reason to disbelieve the case of the prosecution.

##. We are not impressed upon the contention taken by Mr. Vyas because Urmilaben has not deposed that very strong smell of Kerosene was smelt by them when they entered into their house. If in a normal course, if one feels that there is some smell of Kerosene, generally he will not take this type of smell so seriously because it happens in domestic use that Kerosene might have spilt over anywhere, and therefore, this conduct on the part of Urmilaben is not so unnatural that it casts doubt on the entire case of the prosecution.

##. Learned Advocates for the parties have cited certain authorities which we have mentioned in earlier part of this judgment. In case of Padmasundara Rao (Dead) and others v. State of T.N. and others, reported in 2002 AIR SCS 1156, a Constitution Bench of Hon'ble Supreme Court has observed in Para 8A as follows:

Para 8A:

"Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. There is always peril in treating the words of a speech or judgment as though they are words in a legislative enactment and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case."

It is also further observed in aforesaid decision that :

"Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases."

##. As noted earlier, learned Counsel for both the parties have cited more than one authorities at the Bar for our consideration. On going through those authorities, we find that they turned upon their own peculiar facts and the facts in the present case being different than those stated in the authorities, the principle laid down in those authorities is not applicable to the facts of the present case. We have reappreciated the whole evidence on record and discussed all arguments advanced at the Bar by learned Counsel for both the parties. Therefore, we have not thought it fit to discuss and deal with those authorities in detail so as to burden judgment unnecessarily.

##. In view of over all appreciation of evidence led by the prosecution, we find that the learned Judge of the trial Court has rightly convicted the accused No.1 by placing reliance on first dying declaration of the deceased Govindbhai which he gave to Dr. Sharma who in turn reduced that declaration into writing in medical case papers of Govindbhai. He has rightly placed reliance on the history given by Urmilaben to Dr. Sharma who reduced it into writing in medical case papers of Urmilaben. We do not find any material on record which indicates that the judgment of the trial Court, so far as it relates to conviction of accused No.1, is wrong, erroneous and against the evidence on record. Under the circumstances, the appeal preferred by the accused No.1 i.e. Criminal Appeal No. 745 of 1997 is devoid of merits and it requires to be dismissed.

##. So far as appeal filed by the State Government i.e. Criminal Appeal No. 1137 of 1997 against the judgment by which accused Nos.2 to 4 were acquitted by the learned Judge of the trial Court, Shri D.R.Bhatt, learned

Advocate who appeared for the accused Nos.2 to 4 has argued that considerations of the factors in acquittal appeals are quite different than that of in conviction appeals. Shri D.R.Bhatt has cited two authorities (1) Ramesh Babulal Doshi Vs. State of Gujarat, reported in 1996(2) GLH 206 (SC); and (2) Solanki Chimanbhai Ukabhai Vs. State of Gujarat, reported in AIR 1983 SC 484.

##. Now, it is almost well settled principle of law that in such type of acquittal appeals, High Court should address itself to the question as to whether the reasons which weighed with the trial court for recording the order of acquittal were proper or not. It is also well settled principle of law that mere fact that a view other than the one taken by the trial court on reappraisal of the evidence cannot constitute a valid and sufficient ground to interfere with an order of acquittal unless it comes to the conclusion that the entire approach of the trial court in dealing with the evidence was patently illegal or the conclusions arrived at by it were wholly untenable. In case of Ramesh Babulal Doshi (supra), it has been held as under:

> "While sitting in judgment over an acquittal, the appellate court is first required to seek an answer to the question whether the findings of the trial court are palpably wrong, manifestly erroneous or demonstrably unsustainable. If the appellate court answers the above question in the negative, the order of acquittal is not to be disturbed."

##. Here in this case, while reappreciating evidence led by the prosecution for the purpose of deciding appeal filed by accused No.1, we have observed that it was not possible for all the four persons to stand in loft made of bamboos loaded with wooden planks in the hut of the area of 6' x 10'. Moreover, Urmilaben has deposed that accused Nos. 2 and 4 are residing separately from them since more than 8 to 10 years in Gayatri Society which is one Kilo Meter away from their house. We have also observed that by lapse of time, deceased Govindbhai and injured Urmilaben had ample opportunity to discuss with each other in the Civil Hospital at Navsari after they gave history to Dr. Sharma. We have also noticed that relations between the complainant and the accused were not cordial and they were very much strained on account of share in property owned by the father of the deceased and accused No.1. In view of this, testimony of Urmilaben is accepted by the learned Judge of the trial Court, except the portion of her testimony involving

accused Nos. 2 to 4 in crime. We have also observed that possibility cannot be ruled out for Urmilaben to implicate accused Nos. 2 to 4 because of animosity between the complainant and the accused. In view of this, the learned Judge of the trial Court has acquitted the accused Nos. 2 to 4, giving them benefit of doubt. We are in complete agreement with the reasons assigned by the learned Judge of the trial Court for acquitting the accused Nos. 2 to 4.

##. We have minutely and carefully examined and reappereciated the evidence on record. We are satisfied that finding of the trial Court for acquittal of A-2 to A-4 cannot be said to be wrong, erroneous or unsustainable. In view of this, the appeal preferred by the State Government against the accused Nos.2 to 4 is devoid of merits and the same is required to be dismissed.

##. For the foregoing reasons, the impugned judgment Ex.60 dated 19/6/1997 rendered by the learned Additional Sessions Judge, Valsad at Navsari in Sessions Case No. 136 of 1995 is hereby confirmed. Criminal Appeal No. 745 of 1997 filed by accused No.1 Babubhai Laxmanbhai Champaneria is devoid of merits and hence the same is hereby dismissed. Criminal Appeal No. 1137 of 1997 filed by the State of Gujarat against the original accused Nos. 2 to 4 is also devoid of merits and hence the same is hereby dismissed.

Date: /10/2002. ---
ccshah

(M.H.KADRI,J.)

(H.H.MEHTA,J.)